Supreme Court, U.S.
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No.

In the Supreme Court of the United States

October Term, 1995

PAO YANG, YING YANG, JIMMY YANG, BAO YANG, SEYAR YANG and PHONESAVANNE YANG,

v.

IMMIGRATION AND NATURALIZATION SERVICE.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 8 C.F.R. §208.14(d)(2) exceeds the scope of its enabling statute, §208 of the Immigration and Nationality Act, 8 U.S.C. §208, by compelling the denial of asylum in the United States in all cases to a refugee who had been firmly resettled in another country, regardless of any other relevant consideration.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, from which review is sought, is reported at 79 F. 3d 932 (9th Cir. 1996).

JURISDICTION

The judgment of the court of appeals was entered on March 27, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATION INVOLVED

Statutes

1. §101(a)(42)(A) of the Immigration and Nationality Act (the "INA"), 8 U.S.C. §1101(a)(42)(A):

The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion...

2. §207(c)(1) of the INA, 8 U.S.C. §1157(c)(1):

Subject to the numerical limitations established pursuant to subsections (a) and (b), the Attorney General may, in the Attorney General's discretion and pursuant to such regulations as the Attorney General may prescribe, admit any refugee who is not firmly resettled in any foreign country, is determined to be of special humanitarian concern to the United States, and is

admissible (except as otehrwise provided under paragraph (3) as an immigrant under this Act.

3. §208(a) of the INA, 8 U.S.C. §1158(a):

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42).

4. §209(b) of the INA, 8 U.S.C. §1159(b):

Not more than 10,000 of the refugee admissions authorized under section 207(a) in any fiscal year may be made available by the Attorney General, in the Attorney General's discretion and under such regulations as the Attorney General may prescribe, to adjust to the status of an alien admitted for permanent residence the status of any alien granted asylum who

(1) applies for such adjustment,

(2) has been physically present in the United States for at least one year after being granted asylum,

(3) continues to be a refugee within the meaning of section 101(a)(42)(A) or a spouse or child of such refugee,

(4) is not firmly resettled in any foreign country,

(5) is admissible (except as otherwise provided under subsection (c) as an immigrant under this Act at the time of examination for adjustment of such alien.

Regulation

8 C.F.R. §208.14(d)(2): Mandatory Denials. An application for asylum shall be denied if: . . . (2) The applicant has been firmly resettled within the meaning of §208.15.

STATEMENT OF THE CASE

This case is about a man and his family, Hmong survivors of the CIA's "secret war" in Laos, who want the United States to honor the promise it made to them of refuge in this country. The promise, they say, was made to Mr. Yang's father, a Hmong commander and CIA surrogate, in exchange for his continued resistance to communist forces during the war.

The elder Yang kept his part of the bargain. The CIA did not. When the communists overran Laos in 1975, the Yangs fled for their lives to Thailand. There, in a refugee camp, they waited for three years for permission to come here. When it became apparent that the CIA would not help them, and having been threatened with repatriation to Laos, they accepted an alternate haven in France and lived there until 1991, when they came here as visitors. Following denial of their applications for asylum, they sought review in the United States Court of Appeals for the Ninth Circuit under 8 U.S.C. §1105a.

With the court's stamp of approval below, the Attorney General has decided the Yangs cannot be granted asylum. They cannot even tell their story of CIA betrayal because no matter how compelling their reasons may be, they are barred from political asylum by 8 C.F.R. §208.14(d)(2), a regulation which prohibits asylum for anyone who, like the Yang family, was "firmly resettled" in another country before coming to the United States -- unless this Court agrees that the regulation exceeds the scope of the Attorney General's delegated authority.

REASONS TO GRANT THE PETITION

As cases go, this one is not likely to affect a lot of people. Decisions about asylum are the Attorney General's to make in the exercise of her discretion. And she is not likely to grant asylum to very many who were settled elsewhere after their flight from persecution.

Still, simple justice now and then ought to permit the consideration of an asylum application, even for a firmly resettled applicant in appropriate cases, provided of course that Congress meant to keep the door open to that possibility. The purpose of what follows is to show why that is exactly what Congress intended and, consequently, that the Attorney General had no authority to slam the door shut on the Yang family without so much as hearing their story.

The Attorney General's role in the asylum process is governed by §208 of the INA, 8 U.S.C. §1158. Her function, which she has delegated to immigration judges and the Board of Immigration Appeals, is first to determine whether the applicant fits the description of a refugee under §101(a) (42) of the INA, 8 U.S.C. §1101(a)(42), i.e., whether the applicant was a victim of persecution or has a well founded fear of persecution in the country of his or her nationality or, in certain cases, the country of last residence.

Qualifying as a refugee, however, does not guarantee the grant of asylum. Rather, the Attorney General must then decide whether to grant asylum in the exercise of discretion, depending obviously on other relevant considerations. Ostensibly exercising that discretion, the Attorney General issued 8 C.F.R. §208.14(b)(2), mandating the denial of all asylum applications made by refugees who were "firmly resettled" in another country before coming to the United States, regardless of other considerations.

That Congress had no intention of allowing the Attorney General to go that far is the necessary conclusion to be drawn from the statutory scheme relating to refugees and asylum. The scheme begins with §207 of the INA, 8 U.S.C. §1157, which concerns the admission of refugees from abroad. It continues with §208 which authorizes the grant of asylum, in the Attorney General's discretion, to refugees who have come here in some other immigration classification. And it ends with

§209, 8 U.S.C. §1159, which authorizes permanent resident status for such refugees, whether admitted as such from abroad or granted asylum after their entry.

§207(c) contains a bar against the admission from abroad of firmly resettled refugees. §209(b) bars permanent resident status for people were granted asylum but are firmly resettled in another country. §208 contains no provision barring asylum for refugees who were firmly resettled before coming to the United States. Which brings this case squarely within the rule that

> Where Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. INS v. Cardoza-Fonseca, 480 U.S. 421, 432 (1987).

In other words, by omitting a firm resettlement bar in §208 while including it in the companion provisions of §207 and §209, Congress must have intended to leave open the possibility of asylum even for one who was firmly resettled elsewhere.

Consequently, by imposing a firm resettlement bar, the regulation adds a provision to §208 that Congress, for whatever reason, chose to omit. That is not enforcing the law as Congress wrote it. It is making a law Congress did not write. The regulation is, for that reason, invalid on its face.

The opinion of the court below offers no reason to validate the regulation, for it is pinned to a faulty analysis of three significant cases, Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984); INS v. Cardoza-Fonseca, supra; and Reno v. Flores, 507 U.S. 292 (1993).

The lower court's analysis of Chevron begins, as it must, with the question of whether Congress has directly addressed the precise issue at hand. The court found it had not because §208 is silent on the matter of firm resettlement. But what the court forgot to consider is that Congress may address a particular issue just as much by what it does not say in a statute as what it does say.

Consider what Congress did say in §207(c). It said the Attorney General may, in her discretion, admit refugees into the United States from abroad, provided they have not been firmly resettled. Firm resettlement, in other words, was clearly meant to be a restraint on the Attorney General's authority. §208, the very next section, confers a similar discretionary authority on the Attorney General to grant asylum. But it contains no resettlement preclusion. The obvious meaning is that Congress intended no such restraint on the Attorney General's aslyum authority.

Consider also the peculiar language of §209(b). It authorizes permanent resident status to people who have been granted asylum, but under (b)(4) only to those who are "not firmly resettled in any foreign country." Think about it. If Congress meant to let the Attorney General deny asylum to all firmly resettled refugees, there would be no one to bar from resident status under (b)(4) because the same person would never have been granted asylum in the first place. So the only logical and common sense answer is that (b)(4) was meant to bar people from permanent resident status if they were firmly resettled elsewhere after, not before, being granted asylum here.

Moreover, a statute's silence on a particular issue does not absolve the courts of their obligation to seek out congressional intent through employment of "traditional tools of statutory construction." Chevron, supra, 467 U.S. 843, n. 9. Apply the traditional inclusion-omission rule of construction just discussed and the absence of a firm resettlement preclusion from §208 is

an unmistakable sign that firm resettlement was not meant to rule out asylum in all cases.

Nor does that same rule of statutory construction lose its impact just because the particular issue in Cardoza-Fonseca, supra, involved the incompatability of language of two other refugee provisions while the issue here involves the inclusion of language in one provision and its absence from another. If anything, and contrary to the court's opinion below, 79 F. 3d at 937, 938, that distinction only reinforces applicability of the rule to this case. For in its own words, the rule specifically refers to the inclusion of language in one section and its omission from another. So Cardoza-Fonseca is important, not for its facts, but for the rule it applied, a rule that is equally applicable here despite a difference in the facts.[1]

Ironically, the court below went on to ignore an important factual difference in its analysis of Reno v. Flores, supra. That case involved a regulation implementing the Attorney General's discretionary authority to release children taken into custody pending deportation hearings. The rule required the child's release only to a member of the child's family, except in "unusual and compelling circumstances," in which case the child may be released to other adults. 8 C.F.R. §242.24(b)(4).

This Court affirmed the rule as reasonably related to the Attorney General's discretionary authority, despite its presumption that relatives are better able than others to care for a child. But the important point, insofar as it relates to this case, is the exception which the rule itself permits. That is, it allows for release to other adults in special circumstances.

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1. Of course, the rule has been applied to cases involving the omission of language from one provision and its inclusion in another. See e.g., United States v. Wooten, 688 F. 2d 941, 950 (4th Cir. 1982), cited with approval in Russello v. United States, 464 U.S. 16, 23 (1983).

The regulation thus allows the Attorney General to exercise her discretion taking into account all relevant circumstances and to deviate from the presumption favoring relatives when appropriate. But the regulation at issue in this case does not. Under no conceivable circumstance may a firmly resettled refugee be granted asylum. That, as noted in the beginning, is not the true exercise of discretion. It is impermissible law making.

To suggest, as the court below suggested, that Congress merely let the Attorney General fill in a firm resettlement gap in §208 makes no sense in light of the specific preclusions that Congress wrote, in virtually the same breath, into §207 and §209 as to firmly resettled refugees. If Congress had wanted to bar firmly resettled refugees from asylum as well, it had only to say so in §208. It didn't. That it didn't must mean it had no intention of allowing the Attorney General to impose the very same bar it had refrained from imposing on its own.

In that respect, and contrary to the court's opinion below, 79 F. 3d at 936, the INA does indeed compel the Attorney General to consider all relevant facts, not just firm resettlement alone, in the exercise of her asylum discretion. And it doesn't matter whether she does so by rule making or ad hoc adjudication. As the court correctly noted, an agency cannot exercise authority that Congress intended to withhold. In this instance, and for reasons already discussed, Congress intended to withhold from the Attorney General the power to exercise her discretion solely on the single factor of firm resettlement.

CONCLUSION

The concept of firm resettlement obviously is closely connected to refugee and asylum law, the overriding objective of which is generally accomplished when the refugee finds a safe haven anywhere. Rosenberg v. Yee Chien Woo, 402 U.S. 49 (1971).

But Congress obviously had the Woo case before it when it wrote the current refugee and asylum provisions in 1980. And yet it still omitted a firm resettlement bar from the asylum provision of §208. Why? The only logical answer is that despite Woo, it saw the possibility that under compelling circumstances, the Attorney General ought to grant asylum despite the refugee's firm resettlement elsewhere.

For example, what if the country of firm resettlement refuses to permit the refugee to return from the United States? What if conditions in that country have changed in some important aspect which would make it an extreme hardship for the refugee to return? What if a United States government agency had promised the asylum applicant that he or she could live in the United States in return for service to American forces?

None of this means opening the flood gates to undeserving people would seek to "bootstrap" their way into a refuge here by circumventing the ordinary rules for admission to the United States. The Attorney General still has the discretion to deny such applications in the exercise of discretion and could adopt a rule providing for the denial of asylum to firmly resettled applicants in all but the most compelling or unusual cases.

Ironically, the court below noted that "it is precisely to cope with the unexpected that Congress deferred to the experience and expertise of the Attorney General in fashioning §208." 79 F. 3d at 939. Exactly. But how can the Attorney General follow that mandate when her hands are tied by her own regulation precluding the exercise of discretion in the unexpected case on the basis of one single factor? She cannot.

For all of the foregoing reasons, petitioners respectfully urge the Court to grant this petition.

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June 21, 1996

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PAO YANG; YING YANG; JIMMY YANG; BAO YANG; SEYAR YANG; PHONESAVANNE YANG,
Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

No. 94-70439

INS Nos.
A72-399-329
A72-399-330
A72-399-331
A72-399-332
A72-399-333
A72-399-334

OPINION

Filed March 27, 1996

Before: James R. Browning, William C. Canby, Jr. and Cynthia Holcomb Hall, Circuit Judges

Opinion by Judge Hall

The petitioners were denied asylum in the United States under a regulation which categorically precludes asylum for refugees who have "firmly resettled" in another country. *See* 8 C.F.R. § 208.14(c)(2) (1994).[1] They argue that the regulation is ultra vires, and ask us to remand their cause to the Immigration and Naturalization Service ("INS") for consideration on the merits. We have jurisdiction over this timely appeal pursuant to 8 U.S.C. § 1105a(a). Finding that the regulation does not violate its enabling statute, we deny the petition.

I

The petitioners are a Hmong family from Laos. They claim that during the Vietnam War, members of their family cooperated with the American military and CIA against the commu-

[1]The regulation is now found at 8 C.F.R. § 208.14(d)(2) (1995).

nists. In return, they say, they received promises of asylum in the United States.

When the Pathet Lao came to power in Laos in 1975, petitioner Pao Yang, his wife Ying, and others of their extended family fled to Thailand. They claim that they immediately sought passage to the United States, but that the American government denied their request for asylum. For three years the family remained in a Thai refugee camp, until the French government offered them admission to France as refugees. The Yangs accepted the French offer, they say, because Thai authorities threatened them with deportation to Laos if they refused.

Pao and Ying Yang thus took refuge in France, where they remained for fourteen years and had four children, who are also petitioners in this case. In spite of this long period of residence in France, the BIA determined that under French law the family remained foreign refugees rather than French citizens or permanent residents. It is unclear whether the Yangs either applied or became eligible for permanent residence in France. In any event, they maintain that they never intended to remain in France. Pao Yang attests that the family considered France merely a stopping point on their way to the United States, but that the French government refused them travel documentation until 1991. Once they obtained their documents, the parents came to the United States as visitors. The children followed.

The Yangs overstayed their visas, and the INS ordered them to show cause. On January 28, 1994, an immigration judge ("IJ") found them deportable under section 241(a)(1)(B) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1251(a)(1)(B). In reviewing their application for asylum under section 208 of the INA, 8 U.S.C. §§ 1158(a), (c), the IJ determined that the Yangs were ineligible for relief under the accompanying regulations, which deny asylum to applicants who have "firmly resettled" in a third country. *See*

8 C.F.R. §§ 208.14(c)(2) (denying asylum to applicants firmly resettled), 208.15 (defining "firmly resettled").

The Yangs conceded arguendo that they were at one time firmly resettled in France, but denied that they necessarily retained the right under French law to return to France. Furthermore, returning to Laos was not an option. According to an INS report, the Yangs faced continuing threats to "life or freedom" in Laos. On the basis of this advice, the IJ withheld the family's deportation to Laos under section 243(h) of the INA, 8 U.S.C. § 1253(h), and designated France as the family's destination of deportation or, in the alternative, voluntary departure.

The Yangs appealed to the Board of Immigration Appeals ("BIA") solely on the basis that regulation 208.14(c)(2) was ultra vires. The BIA summarily dismissed the appeal on June 28, 1994. The Yangs renew the claim on appeal to this court. We review de novo the BIA's determination of this purely legal question regarding the requirements of the Immigration and Nationality Act. *Ghaly v. INS*, 58 F.3d 1425, 1429 (9th Cir. 1995).

II

[1] Under INS regulation 208.14(c)(2), the finding that an alien has "firmly resettled" in a third country prior to his or her arrival in the United States bars that alien's eligibility for asylum. 8 C.F.R. § 208.14(c)(2). The question presented in this case is whether this regulation violates its enabling statute, section 208 of the INA, 8 U.S.C. § 1158(a),[2] which per-

[2]Section 208 of the INA, 8 U.S.C. § 1158 states, in pertinent part:

Asylum procedure

(a) Establishment by Attorney General; coverage

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port

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mits the Attorney General to grant asylum as a matter of discretion.

Section 208 gives the Attorney General discretion to grant asylum to aliens who meet a statutory definition of eligibility. In practice this decision is delegated to the INS, *see Patel v. INS*, 638 F.2d 1199, 1201 n.1 (9th Cir. 1980), which considers asylum applications in two stages. *See Kazlauskas v. INS*, 46 F.3d 902, 905 (9th Cir. 1995) (describing two-stage procedure). At the first stage, the INS inquires into eligibility. An alien is eligible if he or she is determined to be a "refugee" within the meaning of INA section 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).[3] A finding of eligibility merely entitles the alien to submit an application for asylum; it does not guarantee that asylum will be granted.

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of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title. . . .

(c) Status of spouse or child of alien granted asylum

A spouse or child . . . of an alien who is granted asylum under subsection (a) may . . . be granted the same status . . . .

[3]Title 8, section 1101 states, in pertinent part:

Definitions (a) As used in this chapter—

. . .

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion

. . . .

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[2] At the second stage, the INS makes a discretionary decision on the application. Section 208 does not explicitly limit or structure this exercise of discretion, except to disqualify any alien "convicted of an aggravated felony." 8 U.S.C. § 1158(d).[4] It states only that "an [eligible] alien *may* be granted asylum *in the discretion of* the Attorney General." 8 U.S.C. § 1158(a) (emphasis added). As we have previously noted, this language amounts to a "broad delegation of power" to the Attorney General. *Komarenko v. INS*, 35 F.3d 432, 436 (9th Cir. 1994).

The question before us is whether the INS may exercise this discretion by creating a rule that automatically excludes a particular class of applicants. Under the INS regulations in effect until October 1, 1990, the INS was to evaluate an asylum application by weighing against each other a number of equitable factors. *Matter of Pula*, 19 I. & N. Dec. 467, 473-74 (BIA 1987) (listing the factors to be considered for grant of asylum); *Kazlauskas*, 46 F.3d at 906 (approving and applying the *Pula* standards). These factors had no fixed weight, but were to be taken together and viewed in the "totality of the circumstances." *Pula*, 19 I. & N. Dec. at 474. The October 1990 regulations, which are at issue in this appeal, follow the *Pula* approach, but add to the calculus categorical bars to asylum for aliens in three categories,[5] one of which covers aliens "firmly resettled" in a third country. 8 C.F.R. § 208.14(c)(2).

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[4]This provision was enacted in 1990 as an amendment to the INA. Immigration Act of 1990, Pub. L. No. 101-649, § 501(a)(2), 104 Stat. 4978, 5048 (1990). Before 1990, section 208 placed no explicit limits on the Attorney General's discretion.

[5]The regulation states, in pertinent part:

> (c) **Mandatory denials.** An application for asylum shall be denied if:
>
> (1) The alien, having been convicted . . . of a particularly serious crime in the United States, constitutes a danger to the community;
>
> (2) The applicant has been firmly resettled within the meaning of § 208.15; or
>
> (3) There are reasonable grounds for regarding the alien as a danger to the security of the United States.

8 C.F.R. 208.14.

Under the new regulation, a finding of firm resettlement trumps any other equities in the applicant's favor. The Yangs argue that this rule contravenes the INA by precluding the INS from exercising its discretion in individual cases.

We must reject the argument that regulation 208.14(c)(2) exceeds the authority of the Attorney General if we find that the regulation has a "reasonable foundation . . . that is, if it rationally pursues a purpose that it is lawful for the INS to seek." *Reno v. Flores*, 113 S.Ct. 1439, 1451 (1993) (citing *Carlson v. Landon*, 342 U.S. 524, 541 (1952)) (internal quotations omitted). Following the doctrine announced in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), we must first consider "whether Congress has directly spoken to the precise question at issue." *Id.* at 842-43. Thus we begin with traditional methods of statutory interpretation. If it then appears that Congress has been silent with respect to the specific issue, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. In the face of ambiguity or Congressional silence, we should defer to the agency's considered judgment. *Id.*; *Van Blaricom v. Burlington N. Ry. Co.*, 17 F.3d 1224, 1225 (9th Cir. 1994).

[3] The language of section 208 is silent as to firm resettlement. As discussed above, it simply grants the Attorney General "discretion" to grant asylum to eligible aliens, subject only to an exception for aliens convicted of aggravated felonies. 8 U.S.C. § 1158(d). The Yangs contend, first, that this mandate to exercise discretion precludes the agency's giving conclusive weight to a single factor, such as firm resettlement. In their view, Congress envisaged this "discretion" as something like an individualized accounting of every equity that bears on a particular application. We reject this argument for two reasons.

First, the Yangs mistakenly presume that the equitable factors announced in *Pula* are themselves statutorily mandatory,

and reflect a Congressional determination that *these* factors must be considered in any exercise of "discretion" under section 208. This is false. The *Pula* factors were not dictated by the INA, but were created judicially by the BIA. The INS is, presumably, free to alter or amend them, provided it does so in a manner consistent with the text and purposes of the INA, and without otherwise running afoul of the "arbitrary and capricious" standard set out in section 706(2)(A) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). Regulation 208.14(c)(2) may or may not conflict with *Pula*;[6] this is irrelevant because both are instruments of delegated discretion.

Second, it is a well-established principle of administrative law that an agency to whom Congress grants discretion may elect between rulemaking and ad hoc adjudication to carry out its mandate. *American Hosp. Ass'n v. NLRB*, 111 S. Ct. 1539, 1543 (1991); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). As the Supreme Court has stated, "even if a statutory scheme requires individualized determinations, the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority." *American Hosp.*, 111 S.Ct. at 1543. Thus, in *American Hospital*, the Court permitted the NLRB to promulgate a rule even though the underlying statute, which instructed the agency to make a particularized decision "in each case," suggested a Congressional preference for ad hoc adjudication over rulemaking. *Id.* at 1542.

[6]We note that the BIA itself addressed the relationship between the *Pula* factors and section 208 in a case which arose before the promulgation of regulation 208.14(c)(2). In *Matter of Soleimani*, 20 I. & N. Dec. ___, Int. Dec. 3118 (BIA 1989), the BIA stated that only "in the absence of any regulatory bar" would firm resettlement be treated as one factor of relevance to be weighed against others. This dictum implies that the BIA regarded *Pula* only as an attempt to fill a gap left in INS regulations. We think that the regulation at issue represents the agency's effort to fill this gap.

Under the INA, the term "discretion" does not supplant this general grant of permission for rulemaking. In *Reno*, the Supreme Court upheld an INS regulation in circumstances similar to those before us. The respondents were a class of alien juveniles who had been taken into INS custody pending their deportation hearings. 113 S.Ct. at 1443. Custody was intended to secure their appearance before the INS, and to ensure their safety. *Id.* at 1444. The governing statute, however, permitted the Attorney General "in [her] discretion" to release such aliens into the custody of responsible citizens. *Id.* at 1443; 8 U.S.C. § 1252(a)(1) (1993). The contested regulation was promulgated as an exercise of this discretion. It set out a rule which, in essence, allowed juvenile detainees to be released only to members of their families. *Id.* at 1444. The respondents argued, among other things, that this regulation exceeded the authority of the Attorney General; they contended that under the INA, juveniles should also have the option to be released to other "responsible adults" unrelated to them. *Id.*

The Supreme Court rejected this argument and upheld the regulation. It held that a " 'blanket' presumption of the unsuitability of [unrelated] custodians" was not inconsistent with an exercise of discretion under section 1252(a)(1). *Id.* at 1453. Although discretion under the statute required "some level of individualized determination . . . this [did] not mean that the Service must forswear use of reasonable presumptions and generic rules." *Id.* (quoting *INS v. National Center for Immigrants' Rights*, 112 S.Ct. 551, 558-59 (1991)) (quotation marks omitted). Under this analysis, an exercise of discretion would be sufficiently "individualized" if the INS applied its regulation fairly in individual cases, by individually determining whether each alien would be eligible for the prescribed relief. *Id.* In the present case, this standard is clearly met. The Yangs appeared before an IJ and conceded their firm resettlement in France. There can be no question that the regulation determined the outcome of the Yangs' application.

Recently this court considered and upheld a companion provision to the regulation now at issue. In *Komarenko*, 35 F.3d 432, we held that regulation 208.14(c)(1) did not exceed the authority of the Attorney General under section 1158(a). The regulation categorically barred asylum for any alien convicted of a "particularly serious crime." *Id.* at 436. We found the regulatory bar to be consistent with the discretionary mandate of the statute, both because the statute did not explicitly address the specific issue, and because the INS would be required under the regulation "to exercise individualized discretion in determining whether a particular offense should be counted as 'particularly serious.' " *Id. Komarenko* thus stands for the proposition that "discretion" under section 1158(a) may be exercised by rules giving fixed weight to a particular factor.

This, however, does not conclude our inquiry under *Chevron*'s first prong. The Yangs offer an independent textualist argument to support their conclusion that the regulation is ultra vires. They read INA section 208 together with sections 207 and 209, all three of which were added to the INA enacted by the Refugee Act of 1980. Refugee Act of 1980, Pub. L. No. 96-212, § 201(b), 94 Stat. 102 (1980), *codified as amended at* 8 U.S.C. §§ 1157-1159.[7] They note that while all

[7]Section 207 states, in pertinent part:

> **Annual admission of refugees and admission of emergency situation refugees**
>
> . . .
>
> **(c) Admission by Attorney General of refugees; criteria; admission status of spouse or child; applicability of other statutory requirements; termination of refugee status . . .**
>
> (1) Subject to the numerical limitations [above], the Attorney General may, in [her] discretion and pursuant to such regulations as [she] may prescribe, admit any refugee *who is not firmly resettled* in any foreign country . . .

8 U.S.C. § 1157 (emphasis added).

three of these sections establish procedures relating to refuge and asylum, sections 207 and 209 explicitly bar applications from firmly resettled aliens where section 208 does not. As the Supreme Court has said elsewhere in the course of interpreting provisions of the Refugee Act, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)) (internal quotation marks omitted).

However, we find important differences between the present statutory provisions and those discussed in *Cardoza-Fonseca*. In that case the Supreme Court compared the standards of proof in INA sections 243(h) and 208. Section 243(h) required the Attorney General to withhold deportation for an alien whose "life or freedom would be threatened" in his or her native country. Section 208 gave the attorney discretion to grant asylum to an alien who showed a "well-founded fear"

Section 209 states, in pertinent part:

Adjustment of status of refugees

. . .

(b) Maximum number of adjustments; recordkeeping

Not more than 10,000 of the refugee admissions authorized under section 1157(a) of this title in any fiscal year may be made available . . . to adjust the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum who—

. . .

(2) has been physically present in the United States for at least one year . . .

(3) continues to be a refugee . . .

(4) is *not firmly resettled* in any foreign country . . .

8 U.S.C. § 1159 (emphasis added).

of persecution. The two statutes clearly deployed different and incompatible language to describe their standards of proof. However, the government wished to avoid certain "anomalous" results of having two separate standards of proof in asylum cases. It therefore advised the Court to hold that the same standard of proof applied under both sections. 480 U.S. at 430. The Court disagreed. It reasoned that whereas section 208 expressed both subjective ("fear") and objective ("well-founded") components, section 243(h) described a purely objective inquiry. 480 U.S. at 430-31. The Court concluded that by omitting the word fear from the language of section 243(h), and including it in section 208, Congress meant to express its intention that the two standards of proof should differ. *Id.* at 432.

The present case is not governed by *Cardoza-Fonseca* because the statutory provisions before us present no comparable inconsistency. Section 207 establishes the procedure by which an alien *not* present in the United States may apply for entry as a refugee. 8 U.S.C. 1157(c)(1). It gives the Attorney General discretion to admit any refugee who is "not firmly resettled in any foreign country" and who is "determined to be of special humanitarian concern." *Id.* Unlike section 208, it does not exclude serious felons. Section 208, on the other hand, sets out procedures for granting asylum to refugees *within* the United States. As discussed above, it grants the Attorney General discretion without mentioning firm resettlement or special humanitarian concern, but with an explicit exclusion for certain felons. The plain meaning of these two sections read together is that the Attorney General *may not* admit firmly resettled refugees if they apply from abroad, but *may choose* whether to grant them asylum if they manage to apply from within the United States. Because regulation 208.14(c)(2) represents just such a choice, it appears to be consistent with the grant of discretion described in section 208.

To hold otherwise would improperly constrain the statutory discretion of the Attorney General. The Yangs' "deliberate

exclusion" argument clearly justifies too much; their reasoning suggests that the mention of felons in section 208 precludes an INS rule barring felons under section 207. Likewise, section 207 directs the Attorney General to admit refugees of "special humanitarian concern;" surely this does not prohibit humanitarian concerns from underpinning the regulations written under the authority of section 208.

[4] Against this conclusion, the Yangs argue that firm resettlement appeared in section 207 but not in 208 because Congress intended to favor applicants already present in the United States. They contend that this policy is evident in other provisions of the INA, which, for example, allow aliens illegally present in the United States to win suspension of deportation, registry, or amnesty — privileges unavailable to aliens who remain in their homelands. *See* 8 U.S.C. §§ 1160, 1254, 1255A and 1259. This argument is plausible. But like the Supreme Court in *Reno*, 113 S.Ct. at 1453 n.8, we think it preferable to divine Congressional intent from the statute in issue before we look elsewhere for indications of the applicable policy. According to section 208, Congress intended to permit the Attorney General to decide how best to address the question what weight to attribute to firm resettlement in the asylum process with respect to aliens present in the United States. Furthermore, we think the regulation makes reasonable sense, for reasons we discuss below.

The second half of the Yangs' textualist attack upon the regulation focuses on the relationship between sections 208 and 209. Here again, the analogy with *Cardoza-Fonseca* is inapt. Section 209 permits a section 208 asylee to become a "permanent resident" after one year of physical presence in the United States, *provided* the alien is not firmly resettled in another country. 8 U.S.C. § 1159(b); 8 C.F.R. § 209.2(a)(iv) (1994). As the Yangs rightly point out, section 209 thus contemplates that an alien may have been granted asylum under section 208 even though he or she had firmly resettled elsewhere. Yet under the regulation a firmly resettled alien would

never have been granted asylum. Therefore, they argue, regulation 208.14(c)(2) renders the firm resettlement provision of section 209 superfluous. Be this as it may, we again find no inconsistency. Section 209 clearly allows for the *possibility* that the Attorney General might grant asylum to a firmly resettled alien. However, it does not demand that she do so. Section 209 is pointedly silent with respect to how the Attorney General should exercise her discretionary power under section 208.

[5] Thus we conclude our inquiry under *Chevron*'s first prong: Congress has been silent on the relevance of firm resettlement to asylum applications under section 208. Moving on to *Chevron*'s second prong, we must now ask whether regulation 208.14(c)(2) reflects a permissible construction of the statute. There can be no question that it does. In *Rosenberg v. Yee Chien Woo*, 402 U.S. 49 (1971), the Supreme Court held that the INS *must* take firm resettlement into account in determining whether an applicant met the statutory definition of a refugee. *Id.* at 54-55 (citing "the central theme of all 23 years of refugee legislation—the creation of a haven for the world's homeless people"). Firm resettlement has long been a decisive factor in asylum policy. Even before the regulation was promulgated in 1990, firm resettlement seems to have precluded a grant of asylum in practice. *See Matter of Soleimani*, Int. Dec. 3118 (observing that "a finding that an alien has firmly resettled in a third country would normally preclude a grant of asylum as a matter of discretion").

Nothing in the Refugee Act or its legislative history alters the long-standing significance of firm resettlement to the asylum process. The stated purpose of the Act

> declares that it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands . . . . The Congress further declares that it is the policy of the United States to encourage all nations to provide

> assistance and resettlement opportunities to refugees to the fullest extent possible.
>
> . . . The objectives of this Act are to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States, and to provide comprehensive and uniform provisions for the effective resettlement and absorption of those refugees who are admitted.

Refugee Act of 1980, § 101. Regulation 208.14(c)(2) is fully consistent with these aims. Congress intended to give relief to individuals "subject to persecution in their homelands." Because firmly resettled aliens are by definition no longer subject to persecution, the regulation creates no conflict with this aim. Moreover, the regulation seems directly to "encourage" other nations "to provide assistance and resettlement." Finally, to the extent that the Act's purposes are procedural, the regulation does not impede them.[8]

[6] Furthermore, we cannot say that regulation 208.14(c)(2) represents an unreasonable exercise of the Attorney General's discretion. Without this regulation, a firmly resettled alien living abroad might circumvent section 207 by coming illegally to the United States and applying under section 208. Congress need not have foreseen the "bootstrapping" problem for this rationale to support the regulation; it is precisely to cope with the unexpected that Congress deferred to the experience and

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[8]The legislative history contains no discussion as to why Congress chose not to mention firm resettlement in section 208. *See* S. Rep. No. 256, 96th Cong., 2d Sess., *reprinted in* 1980 U.S.C.C.A.N. 141; H.R. Conf. Rep. No. 781, 96th Cong., 2d Sess., *reprinted in* 1980 U.S.C.C.A.N. 160. We also note that the INS offered no explanation for the firm resettlement bar in promulgating the regulations, nor did outside commentators appear to bring the issue to their attention. *See* 55 Fed. Reg. 30,674-79 (1990); 53 Fed. Reg. 11,300, 11,306 (1988); *see also*, 52 Fed. Reg. 32,552 (1987); 45 Fed. Reg. 37,392 (1980).

expertise of the Attorney General in fashioning section 208. Regulation 208.14(c)(2) effectively *harmonizes* sections 207 and 208 by closing a loophole incentive to illegal immigration. *See also, Abdalla v. INS*, 43 F.3d 1397, 1400 (10th Cir. 1994) (Regulation 208.14(c)(2) "preclude[s] a deportable alien from bootstrapping an asylum claim simply by unilaterally severing his existing ties to a third country . . . .").

III

Because we find that regulation 208.14(c)(2) contravenes neither the letter nor the spirit of its enabling statute, the petition is DENIED.